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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 546

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and Others,

Petitioners,

against

THE CITY OF NEW YORK, and others,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONERS

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SUBJECT INDEX

PAGE

OPINIONS BELOW 3

JURISDICTION 3

STATEMENT 4

SPECIFICATION OF ERRORS TO BE URGED 12

ARGUMENT 13

FIRST: The decree of the New York court with respect to the private easements denied the due process of law required by the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily measured compensation therefor by the value of the easements at the time of their acquisition by the Railroad, rather than as of the time of the taking, and ignored the availability of this property for sale or for uses for other than railroad purposes 13

SECOND: Due process of law was denied by the judgment that only junk value should be paid for the railway structure, which had been found to be suitable and well adapted to its purpose, and that no compensation should be made for the Railroad's franchise and rights in the street 38

1. The Structure 43
2. The Franchise 44
3. The Public Easements 45
4. The Depew Place Easement 47

CONCLUSION 49

TABLE OF STATUTES CITED

PAGE

Judicial Code, Sec. 237, Act of Congress, September 6, 1916, Chap. 448, Sec. 2, 39 Stat. 726; Act of Congress, February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937 3

Chapter 788, Laws of New York, 1917 .....5, 6, 30

Chapter 611, Laws of New York, 1919 .....5, 6, 30, 31, 36

Chapter 635, Laws of New York, 1923 .....6, 31, 32

Chapter 606, Laws of New York, 1875 (Rapid Transit Act) 6, 21, 38, 44

Chapter 140, Laws of New York, 1850 (General Railroad Act) 6

Chapter 481, Laws of New York, 1910 (Railroad Law, Section 237) 28

TABLE OF CASES CITED

Boom Co. v. Patterson, 98 U. S. 403, 408 .....23, 25

Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195 25

Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234 33

Brooklyn Union Elevated R. Co., Matter of, 113 App. Div. 817, aff'd 188 N. Y. 553 20

City and South London Ry. Co. and The Rector, etc. [1903], 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords) 24, 32, 33

PAGE

City of New York (Allen Street) Matter of, 256 N. Y. 236, 241 44
City of New York (Blackwell's Island Bridge), Matter of, 198 N. Y. 84, 88 ..... 19, 40, 43
City of New York (Piers Old Nos. 8-11), Matter of, 228 N. Y. 140, 145 ..... 15, 16
City of New York (Saratoga Avenue), Matter of, 226 N. Y. 128, 135 ..... 35, 36

Denver v. Denver Union Water Co., 246 U. S. 178, 191 44

East Galer Street, In re, 47 Wash. 603, 605, 606 26

Garvey v. Long Island Railroad Co., 159 N. Y. 323 18
Ghee v. Northern Union Gas Co., 158 N. Y. 510, 513 46
Goodin v. Cincinnati & Whitewater Canal Co., 18 Ohio St. 169, 181 24
Grand Trunk Western Ry. Co. v. South Bend, 227 U. S. 544, 555, 556 45
Great Falls Mfg. Co. v. United States, 16 Ct. of Claims, 160, 198-199, aff'd in 112 U. S. 645 25

Heard v. City of Brooklyn, 60 N. Y. 242 ..... 34, 35, 37
Herzog v. New York Elevated R. Co., 14 N. Y. Supp. 296, 297, 298, aff'd 76 Hun. 486, aff'd 151 N. Y. 665 ..... 46, 47
Hindley v. Manhattan Railway Co., 185 N. Y. 335, 354, 355 ..... 15, 16, 47
Hudson & Manhattan R. R. Co. v. Wendell, 193 N. Y. 166, 179 35

Jackson v. State, 213 N. Y. 34 44

Lahr v. Metropolitan Elevated R. Co., 104 N. Y. 268, 288, 289 ..... 13, 14, 21

PAGE

Long Island Railroad Co. v. Garvey, 159 N. Y. 334, 338 18
Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32 45

Manhattan Railway Company, Matter of, N. Y. Public Service Commission Reports (1st Dist.), Vol. 12, page 58 ..... 6, 36, 37
Manhattan Railway Co. v. Mayor, 89 Hun. 429, 431, 43, 44, 46
Mayor, etc., of New York, Matter of, 186 N. Y. 237, 246 34
Mayor, Matter of, 39 App. Div. 589 44
Mayor of New York v. Manhattan Ry. Co., 143 N. Y. 1, 30, 31, 32, 33 ..... 7, 21, 38, 45, 47
McGovern v. New York, 229 U. S. 363 25
Milhau v. Sharp, 27 N. Y. 611, 620 46
Miner v. New York Central & H. R. R. R. Co., 123 N. Y. 242 35
Monongahela Navigation Co. v. United States, 148 U. S. 312, 324, 329 ..... 20, 45
Muhlker v. New York & Harlem R. Co., 197 U. S. 544, 571 ..... 14, 20

National Water Works Co. v. Kansas City, 62 Fed. 853, 865 43
Nellis v. Munson et al, 108 N. Y. 453, 458 14
N. Y. & Oswego M. R. R. Co. v. Van Horn, 57 N. Y. 473, 477 34
New York Telephone Co. v. State, 169 App. Div. 310, 323, aff'd 218 N. Y. 738 ..... 43, 45
New York v. Sage, 239 U. S. 57 25
Ninth Avenue and Fifteenth Street, Matter of, 45 N. Y. 729, 732-5 ..... 32, 33

Olson v. United States, 292 U. S. 246, 255, 256, 20, 22, 28, 44
Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203 . 43

PAGE

Pappenheim v. Metropolitan Elevated Ry. Co., 128 N. Y. 436, 449 20
People ex rel. Manhattan Railway Co. v. Barker, 165 N. Y. 305, 316, 317, 326, 327 ..... 16, 17, 18
People ex rel. Manhattan Railway Co. v. Woodbury, 203 N. Y. 231 16
People ex rel. New York Elevated R. Co. v. Commissioners, 82 N. Y. 459, 462 44

Scallon v. Manhattan Railway Co., 185 N. Y. 359, 363 15
Story v. New York Elevated R. Co., 90 N. Y. 122 ..... 7, 13, 21

United States v. Boston, Cape Cod & N. Y. Canal Co., 271 Fed. 877, 889 43

Western Union Tel. Co. v. Penn. R. R., 195 U. S. 540, 570 ..... 34, 35
White v. Manhattan Railway Co., 139 N. Y. 19, 26 ... 46

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

Writ of certiorari was granted by this Court on January 7, 1935, on the application of the petitioners to review the judgment of the Supreme Court of the State of New York entered in the Office of the Clerk of the County of New York on September 13, 1934, in a condemnation proceeding brought by the City of New York to acquire the private and public street easements, railway structures and franchises constituting the part of the Manhattan elevated railway in the City of New York known as the 42nd Street spur. This judgment was entered upon the *remittitur* of the Court of Appeals of the State of New York dated July 3, 1934.

The petitioners were the claimants in that proceeding. The Manhattan Railway Company (hereafter called "Manhattan") was the owner of the elevated railways subject to a lease made January 1, 1903, to Interborough Rapid Transit Company (hereafter called "Interborough") for a period of 999 years from November 1, 1875. William Roberts is the Receiver of Manhattan appointed by order of the United States District Court for the Southern District of New York entered September 6, 1932. He was made a party to this proceeding by order of the Supreme Court, New York County, entered December 21, 1932. Central Hanover Bank and Trust Company is the trustee under a first mortgage (securing $40,683,000 of bonds) and The Chase National Bank of the City of New York is trustee under a second mortgage (securing $4,523,000 of bonds) upon the Manhattan's properties.

The respondents are the City of New York, which condemned the spur, and certain assessed property owners.

By the judgment under review the claimants were awarded compensation for the condemnation of the spur as follows:

> (1) For the elevated railway structure—$235, being the value when taken down, that is as *junk;*
>
> (2) For the public franchise to maintain the railway in the street and the rights or estate in the street space occupied—*nothing;*
>
> (3) For the so-called private easements acquired by the Railroad from abutting property owners—$539,117.41, which figure was arrived at by a valuation of these easements *on the basis of the dates of their acquisition by the Railroad.*

OPINIONS BELOW

The prevailing and dissenting opinions of the Court of Appeals (R. 410) rendered July 3, 1934, are reported in 265 N. Y. 170. The opinion of the Trial Court upon the first trial (*R. Ex. AX, Vol. IV, 1933) is reported in 126 Misc. 879. The opinion of the Appellate Division, First Department, on the first appeal (R. 283) is reported in 229 App. Div. 617. The opinions of the Trial Court (R. 331, 341) upon the trial of the issues remitted by the Appellate Division in its opinion are reported in 141 Misc. 565 and 143 Misc. 129. The decision of the Appellate Division, First Department, affirming without opinion this decision of the Trial Court (R. 407) is reported in 238 App. Div. 832.

JURISDICTION

The judgment of the Supreme Court, on the *remittitur* of the Court of Appeals, was entered on September 13, 1934 (R. 426-427). The jurisdiction of this Court is invoked under Judicial Code, Section 237, as amended by Act of Congress September 6, 1916, Chapter 428, Section 2, 39 Stat. 726, and Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937. Petition for writ of certiorari to review the judgment was filed November 27, 1934, and granted by this Court on January 7, 1935.

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*"Exhibit AX" is the designation given in this proceeding to the record, in four volumes, of the first trial of this proceeding before Mr. Justice O'Malley. The remaining volume (herein designated simply "R") is the record of the proceedings subsequent to the first trial. All references to the Record and to Exhibit AX are to pages, rather than to folios.

The rights under the federal constitution relied upon in the petition for writ of certiorari and in this brief were raised in claimants' objections to the tentative decrees above referred to, upon the record in all of the trials and appeals herein and upon the briefs and arguments (R. Ex. AX, Vol. I, 157-158, 173-176, 181-182; R. 103-106, 113-114, 122-123, 136-139, 189-190, 195). The judgment of the Court of Appeals could not have been rendered without denying them. The constitutional questions are specifically referred to in the dissenting opinion of Judge Lehman (265 N. Y. p. 183; R. 421).

The City of New York and certain assessed property owners on December 4, 1934, obtained an order extending until February 9, 1935, the time within which they might file a cross-petition for certiorari. A cross-petition was filed by certain of the property owners, but not by the City of New York, on February 8, 1935, which was denied by this Court on March 18, 1935 (No. 691, October Term, 1934).

STATEMENT

This condemnation proceeding was instituted by the City of New York on July 13, 1923, pursuant to the special legislative enactments hereafter described. Title vested on December 7, 1923 (R. Ex. AX, Vol. I, 94), and the structure was removed in May of 1924 (R. Ex. AX, Vol. II, 986).

This 42nd Street spur was erected in 1877 and 1878 and was put into operation in the latter year (R. Ex. AX, Vol. I, 273). It was built as part of the Third Avenue line, under a perpetual franchise, to form a connection with the Grand Central Terminal, and after the first few months

was operated as a free transfer shuttle. It extended from the elevated station at 42nd Street and Third Avenue westerly about 900 feet through East 42nd Street to a terminal on Park Avenue opposite the Grand Central Station. The structure was the familiar type of elevated roadway and rails supported by girders resting upon iron columns sunk from eight to twenty-eight feet into the earth (R. Ex. AX, Vol. I, 337). The nature and location of the structure is shown in detail by a map (R. Ex. AX, Vol. IV, 1932) and by numerous photographs (R. Ex. AX, Vol. IV, 1906, 1928).

The first statute looking towards the removal of the spur, passed in 1917 (Laws 1917, c. 788), was purely permissive and required the consent of Manhattan. Manhattan declined to give such consent (126 Misc. p. 883; R. Ex. AX, Vol. IV, 1936), and by Chapter 611 of the Laws of 1919, the 1917 Act was amended by the insertion of a new section providing that, if "no agreement can be reached with the Manhattan Railway Company as to the removal of said tracks, structure, station and appurtenances", the Public Service Commission, on the request of the Board of Estimate and Apportionment of the City, should institute a proceeding and conduct hearings to determine whether these properties "are necessary and convenient for the public service, or whether, even if necessary and convenient, such tracks, structure, station and appurtenances constitute an impediment or obstruction to the public street". Upon the Commission making a certificate that either of these conditions existed, it was provided that the City should have the right to condemn and remove these properties from the street and that the City should then "condemn the rights, easements and franchises of the said Manhattan Railway Company to construct, maintain, operate or use said tracks,

structure, station and appurtenances or any unit or portion thereof".

The certificate of the Public Service Commission, pursuant to the provisions of this statute, was issued on April 22, 1921 (R. Ex. AX, Vol. II, 1096, 1102). The opinion of the Commission is reported in 12 P. S. C. Rep. (1st Dist.) 58. The Board of Estimate and Apportionment then determined to institute condemnation proceedings. It further determined "that no part of the cost and expense of said proceedings * * * shall be borne and paid by the City of New York but that the whole of such cost and expense * * *" should be assessed 65% on the property fronting the spur in East 42nd Street and the remaining 35% on an area of assessment extending from 34th Street to 50th Street and from Fifth to Second Avenues (R. Ex. AX, Vol. I, 88-89).

The Act of 1923 (Laws 1923, c. 635) amended the 1917 and 1919 Acts chiefly by describing the property to be condemned with greater particularity and authorizing the assessments for benefits.

The property condemned included:

(1) The railway structure;

(2) The perpetual franchise to construct and operate the railway which was granted to Manhattan pursuant to the Rapid Transit Act (Laws 1875, c. 606) under which that company was formed, and to its predecessor, the New York Elevated Railway Company, which had been incorporated under the General Railroad Act of 1850 (Laws 1850, c. 140) and which was taken over by Manhattan under a merger agreement in 1881 (R. Ex. AX, Vol. III, 1636); and the right to occupy street space (referred to in this

proceeding as the "public easements") which the franchise carried with it;

(3) The so-called "private easements" acquired from abutting property owners.

The origin of these private easements was as follows: At the time that the elevated railroad lines were constructed it was generally understood that the franchise granted to the companies all of the rights necessary to construct, maintain and operate the elevated railroads, and that abutting property owners would have no right to interfere therewith (*Mayor of New York* v. *Manhattan Railway Co.*, 143 N. Y. 1, 31). In 1882, however, the New York Court of Appeals held in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, that the owners of property abutting on the streets occupied by the elevated structures had easements of light, air and access, which were property within the meaning of the constitution "taken" by the construction of the railroad and which the state was incapable of conveying to the railroad by its franchise. The railroad then proceeded to acquire from the abutters the necessary easements. Some it acquired by purchase, one by condemnation, some by deeds required by the courts to be given upon payment of the adjudicated value of the easements as alternative to injunctions granted in abutters' suits, and some by prescription. All such titles were held to be identical (229 App. Div., p. 624; R. 294). The private easements here in question were so acquired by Manhattan during the years 1888 to 1904 (Ex. BX, R. 319).

The case was first tried in the New York Supreme Court by Mr. Justice O'Malley at an Extraordinary Special Term. A tentative decree was made and filed April 11, 1927, and claimants, the City, and numerous property owners

subject to assessments for benefits, filed objections (R. Ex. AX, Vol. I, 149-233). He found, as had not been disputed, that the spur structure "was suitable for and well adapted to the purposes of an elevated railway" and gave it substantial value, based largely on reproduction cost less depreciation, adopting the City's figure, on this basis, of $120,438 in preference to the claimants' figure of $185,513 (126 Misc. p. 912-913; R. Ex. AX, Vol. IV, 1983, 1984). For the perpetual franchise and public easements which, he held, were "so inseparable in their nature that they must be considered as a single entity", he allowed together the lump sum of $25,000 (126 Misc. pp. 889, 911; R. Ex. AX, Vol. IV, 1980). For the private easements he awarded the lump sum of $750,000, giving consideration to cost, franchise value, depreciation and other elements rather than the present reproduction cost (126 Misc. p. 912, R. Ex. AX, Vol. IV, 1981, 1982). The claimants proved at the trial that, as of the date of condemnation, the market value of the private easements, determined by the difference between the value of the abutting property with and without the easements of light, air and access, was $3,600,000 (R. Ex. AX, Vol. II, 852, 854, 869, 871-872) and that it would have cost the claimants that sum to acquire these easements on that day. The City, as stated by the Court, did not controvert this evidence (126 Misc. p. 912; R. Ex. AX, Vol. IV, 1981). The Court also awarded an undisputed item of $80,000 representing reconstruction costs at Third Avenue necessitated by the removal of the spur. The final decree, entered upon Mr. Justice O'Malley's decision, therefore awarded $975,438 principal, which, with interest, made a total of $1,222,711.53 (R. Ex. AX, Vol. I, 30-31).

Cross appeals were then taken to the Appellate Division, First Department (R. Ex. AX, Vol. I, 5-21) which on

May 9, 1930, reversed this final decree except as to the undisputed item of $80,000. The Appellate Division held that the structure should be valued only as scrap, that the franchise and public easements were of no value, and with respect to the private easements held:

> "We value the rights to impair the light, air and access appurtenant to the property abutting on East 42nd Street at the time of the vesting of title herein upon the basis of the value judicially determined at the time of the original acquisition of these rights."

It remitted the proceedings to the Supreme Court for determination in accordance with this opinion. (229 App. Div. p. 630; R. 305).

The issues thus remitted were first tried before Mr. Justice Mullan, who died after rendering an opinion (141 Misc. 565; R. 331), and preparing a tentative decree, but before filing the final decree. All parties filed objections to the tentative decree (R. 90-172). Upon the retrial Mr. Justice Ingraham, upon the same testimony, exhibits and rulings (R. 182-183), adopted the opinion of Mr. Justice Mullan (143 Misc. 129; R. 341) and made the final decree. The award upon this retrial amounted to $619,352.41 principal, consisting of the undisputed $80,000 item, $235 for the structure valued as scrap, and $539,117.41 for the private easements, valued by a computation hereafter described, "upon the basis of the value judicially determined at the time of the original acquisition" as directed by the Appellate Division. The total award, with interest, was $932,125.38.

Upon cross appeals, again taken by all parties, the Appellate Division, First Department, approved the application of its rule of valuation made by the trial court and

unanimously affirmed the final decree without opinion (228 App. Div. 832; R. 388).

Cross appeals to the Court of Appeals were then taken by all parties both from the final order of the Appellate Division entered March 24, 1933, affirming the final decree on the retrial of the remitted issues, and from its intermediate order dated May 9, 1930 reversing the final decree entered upon the first trial (R. 345-385). The Court of Appeals on July 3, 1934 affirmed the judgment, the majority opinion being written by Chief Judge Pound and Judges Lehman and Hubbs dissenting on an opinion by Judge Lehman (265 N. Y. 170; R. 410).

With respect to the private easements, the method adopted by the courts to carry out the direction of the Appellate Division on the first appeal, that they should be valued "upon the basis of the value judicially determined at the time of the original acquisition of these rights", is set forth in the opinion of Mr. Justice Mullan and was as follows:

There were two blocks involved, one between Lexington and Park Avenues and the other between Lexington and Third Avenues. In each block there were some parcels which had been the subject of judicial determination, resulting in decrees determining the value of the easements taken and directing the abutting property owners to execute conveyances upon payment of the amounts of the awards. The others had been acquired by Manhattan either by settlement with and conveyance from the abutting owners or by prescription (Exs. BX, CX, DX, R. 319-321). The method adopted to compute the value of the easements on each block with respect to parcels as to which there had been no judicial determination was to multiply the front footage

of those parcels by the average front foot value found with respect to the parcels on such block as to which there had been such determinations. The total award for the private easements was then reached by adding to the total amount paid by Manhattan upon the judicial determinations the value, thus computed, of the easements with respect to the remaining parcels as to which there had been no determinations.

The average date of the judicial determinations, which thus controlled the valuation of all these properties, was 1898 (Ex. BX, R. 319). At that time many of the lots in question were vacant and the extraordinary development of these two blocks and the concomitant rise in real estate values there had scarcely begun. Between 1898 and the vesting of title in 1923 there occurred, among other things, the reconstruction of the Grand Central Station and the erection of the Commodore Hotel, the Pershing Square Building, the Bowery Savings Bank Building, the Long Beach Building, and the motor viaduct over 42nd Street and around the Grand Central Station (R. Ex. AX, Vol. II, 823, 845-848).

There was one easement (known in this proceeding as the Depew Place easement) for which no compensation whatever was awarded. At the time the railroad was constructed, the plot to which this easement was appurtenant (having a frontage of fifty feet on 42nd Street) was owned by the New York Central Railroad. In 1885 and before any prescriptive period had run in favor of the Railroad, the City purchased the plot and used it as a public street known as Depew Place. In 1905 the New York Central repurchased this plot and it thereafter remained in that private ownership. Mr. Justice Mullan held (141 Misc. pp. 568-570; R. 333-336) that title to this easement passed to

Manhattan, not from the private owner, but from the City, by virtue of its grant made in 1878 in connection with the franchise, which he held took effect immediately upon the City's acquisition of title in 1885. Despite the fact that at the time of condemnation this was an easement over private property, he held that no value with respect to it could be included in the award.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court and the Court of Appeals erred:

1. In measuring the compensation for the private easements of light, air and access, acquired by Manhattan from the abutting property owners, upon the basis of the value judicially determined at the time of the original acquisition of those rights, rather than at the time of the vesting of title herein, and in ignoring the availability of the property for sale or for other than railroad uses;

2. In awarding no compensation with respect to the private easement in connection with the Depew Place frontage;

3. In awarding for the elevated structure only its scrap value, and in not awarding therefor its structural value based on cost of reproduction less depreciation;

4. In awarding no compensation for the railroad's franchise or its rights thereunder to occupy East 42nd Street.

ARGUMENT

FIRST: THE DECREE OF THE NEW YORK COURT WITH RESPECT TO THE PRIVATE EASEMENTS DENIED THE DUE PROCESS OF LAW REQUIRED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT ARBITRARILY MEASURED COMPENSATION THEREFOR BY THE VALUE OF THE EASEMENTS AT THE TIME OF THEIR ACQUISITION BY THE RAILROAD, RATHER THAN AS OF THE TIME OF THE TAKING, AND IGNORED THE AVAILABILITY OF THIS PROPERTY FOR SALE OR FOR USES FOR OTHER THAN RAILROAD PURPOSES.

The origin of these private easements has been described in the Statement (*supra*, p. 7).

The holding in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, *supra*, that the construction of the railroad constituted a "taking" of the abutting owners' easements of light, air and access was necessary to the decision, for the law did not permit recovery for consequential injury to private property caused by operations for public use, but only for its taking for such purpose.

The principles decided in the *Story* case were reaffirmed in *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, where they were summarized as follows (pp. 288-289):

> "*Second.* That abutters upon a public street * * * acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.

"*Third.* That the ownership of such easement, is an interest in real estate, constituting property within the meaning of that term, as used in the Constitution of the State, and requires compensation to be made therefor, before it can lawfully be taken from its owner, for public use.

"*Fourth.* That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easements, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

These principles have become a firmly established rule of property in New York. *Muhlker* v. *New York & Harlem R. Co.*, 197 U. S. 544.

That which the railroad acquired from the abutting owners was, therefore, "an interest in real estate", an "easement". Easements "are created, granted, assigned, extinguished and inherited in the same manner and by the same forms as other real property, and are distinguished therefrom mainly by the fact that they are incorporeal, instead of corporeal property". *Nellis* v. *Munson et al.*, 108 N. Y. 453, 458.

The proceedings taken by the railroad to acquire from the abutters the easements which the Court of Appeals had held requisite to the construction and operation of the road have also been briefly referred to. The opinion of the Appellate Division (229 App. Div. p. 623; R. 292-294), after stating that the parties have treated these rights as

"arising upon conveyances," quoted from a typical sample of the combination grant and release. It included a grant and conveyance from the abutter to the railroad of "all the right, title and interest of the said party of the first part in said East 42nd Street, and the lands forming the bed thereof, and the easements therein, appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same is now constructed, maintained and operated, except as hereinafter stated * * *". (See conveyances, R. Ex. AX, Vol. III, 1646-1717.)

In the courts below the City contended that the "taking" by the railroad of the abutters' easements was by destruction and did not result in the acquisition by the railroad of any property which it could continue to possess. We submit that such a contention is wholly foreclosed by the decisions of the Court of Appeals of New York. Out of the many conflicting expressions which may be found in the opinions of that court regarding the nature of this property, the principles which are controlling here stand established by its holdings in the *Story* and *Lahr* cases, *supra,* and its decisions subsequent to them.

That court held in *Hindley* v. *Manhattan Railway Co.,* 185 N. Y. 335, that the railroad might acquire the easements by prescription. Such a decision negatives the notion that what happened was the "extinguishing" of the abutters' easement, without the transfer of any property right to the railroad. "Prescription rests upon the presumption of a grant * * *." *Scallon* v. *Manhattan Railway Co.,* 185 N. Y. 359, 363. "Where no express grant can be allowed the law will not resort to the fiction of an implied grant so as to create a prescriptive right." *Matter of the*

City of New York (Piers Old Nos. 8-11), 228 N. Y. 140, 145. In the *Hindley* case, *supra*, the Court of Appeals said (p. 354) that

> "* * * the easements were appropriated by the erection of a solid and permanent structure of such huge size as necessarily to be observed by all. For more than twenty years the structure in each stood, proclaiming the open and exclusive possession by the railroads of the easements formerly belonging to the abutting owners."

And again (p. 355):

> "Without leave or license from the plaintiff the defendants took physical possession of his property at the outset, and from that day to this have never let go. The seizure was by building a huge structure of iron in the street, which we have held to be permanent, and have frequently awarded damages on that basis. The defendants grasped the easements of the plaintiff as by an iron hand and never loosened their hold."

These easements in the hands of the railroad company have been taxed as property. *People ex rel. Manhattan Railway Co.* v. *Barker*, 165 N. Y. 305; *People ex rel. Manhattan Railway Co.* v. *Woodbury*, 203 N. Y. 231. In the *Barker* case the Court of Appeals said (pp. 316-317):

> "The rights acquired are the easements of light, air and access of the abutting property owners in the streets occupied by the elevated railroad structure, and when these easements are acquired by the company its structure becomes lawful and its right to operate its road in front of the abutting property unquestioned. (*Messenger* v. *Manhattan R. Co.*, 129 N. Y. 502). The acquirement of these ease-

> ments, it is true, destroys in a measure the value of the abutting property, but to the extent that such value is destroyed, that of the railroad company is increased. We think, therefore, that the fee damages represent property that may be assessed."

Any idea that this holding that the railroad company acquired property was not advisedly reached on full consideration is dispelled by the dissenting opinion of Judge O'Brien therein, which asserted views in all essential respects the same as those upon which the City's contention in the courts below ultimately rests. He argued that what the railroad received in consideration for its payments to the abutters was not property but immunity from suit. Judge O'Brien said (p. 326):

> "The damages which a party is obliged to pay as compensation for an injury to the property of another are, as to the wrongdoer, a total loss. He is compelled to pay, not because he has purchased or acquired any property, but for the reason that he has destroyed that of another."

and again (p. 327):

> "The instrument which the property owner delivered to the relator upon payment of the judgment may for convenience be called a conveyance, or deed, but the name given to it cannot change its real character or its legal effect. It operated simply to release the right of the property owner to bring successive actions in the future against the relator for the continuing injury."

The view thus expressed was rejected by the majority of the Court of Appeals.

Prior to its decision in the *Barker* case the Court of Appeals had held that, in a similar situation, the easement is property transferred to the railroad and that the railroad holds it as an easement. In *Long Island Railroad Co.* v. *Garvey*, 159 N. Y. 334, the court said (p. 338):

> "This right of interference with Mr. Garvey's property, by jarring and shaking his dwelling house, causing smoke to penetrate the rooms occupied by his family, and casting dust, ashes and cinders upon the furniture therein, was in the nature of an easement in his land, as the servient estate, in favor of the land of the railroad company, as the dominant estate. It comes within the definition of an easement, as given by courts and commentators, when they say that it is a permanent privilege that enables the owner of land to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with general ownership. * * * But whether the privilege is an easement, or merely a right in the nature of an easement, the effect of the proceedings in condemnation is to carve out of defendant's property something of value and transfer it to the plaintiff. While the part taken is not easy of description, it can be conveyed as an interest in land, and will enable the plaintiff to carry on its business by using its own property exclusively, instead of using to some extent the property of another."

The opinion from which the above quoted extract is taken was rendered in the condemnation proceeding brought by the railroad to acquire the easement, in the absence of which the court had earlier held in *Garvey* v. *Long Island Railroad Co.*, 159 N. Y. 323, the abutting property owner might enjoin its operation. This situation was thus in all

respects analogous to the elevated railroad cases pursuant to which the Manhattan had been compelled to acquire from the abutting property owners the easements here in question.

As Judge Lehman said in his dissenting opinion in the present case,

> "After the owner has been compelled to pay for the acquisition of these rights because the courts have held that they were property rights, and after such rights have been made subject to taxation by the State because they constitute property rights, it seems to me too late for the State to urge that it may destroy these rights without paying for them the value which the owner could otherwise have obtained as the price of their sale or abandonment." (265 N. Y., pp. 189-190; R. 420).

See *Matter of City of New York* (*Blackwell's Island Bridge*), 198 N. Y. 84, 88.

The Court of Appeals in the present case directed the affirmance of a judgment which, under the instructions of the Appellate Division, measured compensation "upon the basis of the value judicially determined at the time of the original acquisition of these rights". The result has been to fix compensation upon the basis of values at dates remote from the time of the taking. We submit that this constituted a taking of this property without due process of law in violation of the Fourteenth Amendment.

The Federal Constitution requires that in condemnation compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof.

In *Olson* v. *United States,* 292 U. S. 246, this Court referred to its statement of the requirement in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324, of "a full and exact equivalent" for the property as an apt expression of the requirement of both the state and federal constitutions and said (p. 255):

> "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306. *Jacobs* v. *United States,* 290 U. S. 13, 17. 2 Lewis, Eminent Domain, 3d ed. § 682, p. 1172. It may be more or less than the owner's investment. * * * It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases,* 230 U. S. 352, 454."

The value of these private easements has always been judicially recognized to be the difference between the value of the abutting property when subject to the railroad's easements and its value when not so subject. *Pappenheim* v. *Metropolitan Elevated Ry. Co.,* 128 N. Y. 436, 449; *Matter of Brooklyn Union Elevated R. Co.,* 113 App. Div. 817, aff'd in 188 N. Y. 553; *Muhlker* v. *New York & Harlem R. Co.,* 197 U. S. 544, 571, *supra.* This was the basis of the opinions of market value given by the undisputed testimony of the railroad's expert at the trial (R. Ex. AX, Vol. I, 852, 854, 870-872). The Appellate Division recognized (229 App. Div. 624; R. 295) that these easements "have been judicially valued as representing the amount which has been taken from the value of the abutting property after allowing for all the benefits received". But the Appellate Division and the Court of Appeals held that this method must be applied to real estate values at the time of

the railroad's acquisition of the property between the years 1888 and 1904, instead of such values at the time of the condemnation in 1923.*

This deprived the railroad of the appreciation, to which it was entitled, in the value of the investment in these easements which was forced upon it by the *Story* and *Lahr* decisions. In *Mayor, etc., of New York* v. *Manhattan Railway Co.*, 143 N. Y. 1, 31, the Court of Appeals said:

> "It is safe to say if at that time the interest of abutting owners had been understood to be as it has been since decided, not a railway would have been built under the provisions of this act of 1875."

The size of the award which is produced by application of 1923 values to the recognized method of valuing such easements arises only from the same circumstances which would have produced large profit from any other form of real estate investment upon these two particular blocks on East 42nd Street, namely, the extraordinary development, prior to the condemnation, of these blocks through the erection of the large buildings above described (*supra*, p. 11). Obviously, on other very large stretches of the elevated system the forced investment in such easements may result in slight, if any, profit. The fact that the application of the proper principle to these two particular blocks would result in a large award is no reason for not applying it.

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*The New York courts' theory that compensation must be determined by conditions existing at the time of the railroad's acquisition of the easements contributed to the anomalous result that no compensation whatever was awarded with respect to the so-called "Depew Place easement". The facts regarding this are set forth in the Statement. The matter is discussed under Point SECOND because the denial of all compensation for this easement was rested chiefly upon the supposed lack of value of the franchise and the public easements which the railroad obtained pursuant to it.

The opinion of the Appellate Division prescribed a single arbitrary standard of value,—that judicially determined at the time of the acquisition of these easements by the railroad between 1888 and 1904. We make no contention that the rule thus prescribed was not correctly applied by Mr. Justice Mullan and Mr. Justice Ingraham at the re-trial. But the effect of it was to preclude any manner of evidence of what these easements were worth in 1923.

The New York courts attempted to justify their decision, valuing the easements "at the time of the vesting of title herein upon the basis of the value judicially determined at the time of the original acquisition of these rights", on the ground that they could only be used in connection with an elevated railroad or a kindred purpose and that the operation of the 42nd Street spur by the railroad had been unprofitable. From these premises the Appellate Division concluded (229 App. Div., p. 628; R. 301) that "We are unable to find that these rights for such a purpose have increased in value over what they were worth when they were acquired". We shall discuss in Point Second the court's assumption that the operation of the spur had been unprofitable. For the sake of the present argument we assume that it is so. Nevertheless we submit that in thus limiting consideration to the railroad's use of the property and ignoring its availability for other uses or for sale, the court also violated the constitutional guaranty. This Court, in *Olson* v. *United States*, said (292 U. S., pp. 255-256):

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which

> it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Comm'n*, 291 U. S. 227. 2 Lewis, Eminent Domain, 3d ed., §707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., §220, p. 671."

And this Court further there said that its prior decision in *Boom Co.* v. *Patterson*, 98 U. S. 403, cited in the passage above quoted, "is authoritative in state courts in all condemnation cases in which the owner invokes protection of the due process clause of the Fourteenth Amendment" (292 U. S., p. 259). In that case this Court said (98 U. S., p. 408):

> "* * * The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

In that case the lands taken were found to be particularly adapted for the formation of booms, and it was held

to be of no consequence that the owner could not have put them to that use without legislative authority.

Among the authorities cited with approval by this Court in the *Boom Company* case, *Goodin* v. *Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169 is especially apposite. There a railroad condemned a perpetual easement for a canal owned by a canal company of which it had stock control. The amount of the award was arrived at by agreement between the two companies, apparently on the basis of a valuation of the property for canal purposes. In a suit by minority stockholders the agreement and award were held not conclusive, the court saying, (p. 181):

> "True, the evidence shows that the property was of little value *as a canal*. As such, in the language of defendants' witnesses, it was 'played out'. It seems to have been as such that it was appraised, upon the interlocutory order of sale, and as such it must have been valued by the two boards of directors, at the time of its sale or *pro forma* condemnation. This was no fair method of estimating the value of the property. The true value of anything is what it is worth when applied to its natural and legitimate uses—its best and most valuable uses."

Again the fact that the stockholders of the canal company could not without further legislative authority have diverted the canal to railroad use was held not determinative.

In *City and South London Ry. Co. and The Rector, etc.* [1903] 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords) the court held that property which had been permanently consecrated and appropriated to spiritual uses should nevertheless be accorded in condemnation full market value based upon its availability for all uses.

See also *Great Falls Mfg. Co.* v. *United States,* 16 Ct. of Claims, 160, 198-199, aff'd in 112 U. S. 645.

There is nothing in this contention which runs counter to the expression of this Court in *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195, (to which the Appellate Division referred, 229 App. Div. p. 628; R. 302) that "the question is what has the owner lost, not what has the taker gained". That case involved a claim of loss "suffered by no one in fact". The claimants there sought to recover more than the value of the property as it stood at the time of condemnation upon the theory that with the "connivance or concurrence" of other property owners a loss "of theoretical creation" could be recovered. In short, there was an attempt to establish a market value which had not existed. *New York* v. *Sage,* 239 U. S. 57; *McGovern* v. *New York,* 229 U. S. 363. The rule of *Boom Co.* v. *Patterson,* 98 U. S. 403, that "the mere mode of occupation does not necessarily limit the right of an owner's recovery" was reaffirmed. In the present case what the owner lost was property which has always been valued in relation to the abutting property. It so happens that the abutting property gains the equivalent. But an award measured by the difference between the value of the abutting property when subject to the railroad's easement and its value when not so subject would be in no sense measuring the compensation by what the taker gained rather than by what the owner lost. It would be the natural method of recognizing availability to the owner for a valuable use. We submit that this was its recognizable fair market value at and prior to the time of condemnation and, it may be added, it was precisely what the railroad would have had to pay in order to acquire the same property at the date of condemnation.

Especially apposite is the case of *In re East Galer Street*, 47 Wash. 603. This was a proceeding to condemn for street widening purposes a strip of land one foot wide which ran between the street and the property of a third party. The City contended that the strip had no value. The owner claimed a value based upon the difference between the third party's property, with frontage on the street, and without it. It was held error for the lower court to have refused instructions in accordance with the owner's contentions. The Court said (pp. 605-606):

> "A tract of land may be of value for but a single purpose; it may be of value to but few persons, and it may have no value, except in connection with other lands owned by other parties. But if it has a value for any purpose, or to any person, or in connection with other lands, a jury will not be warranted in finding that it is without value.
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> * * *
>
> "While the owner of a strip of land like this should not be permitted to take advantage of the necessities of others in fixing its value in a proceeding of this kind, yet, on the other hand, neither a city nor the adjoining owner should be permitted to confiscate his property because of no value in use to him."

We submit that it is the value of this property measured by the difference between the value of the abutting property at the time of the taking when subject to the railroad's easements and its then value when not so subject for which the railroad is entitled to be compensated. The testimony that the market value of these rights upon that basis was $3,600,000 is undisputed.

The majority opinion of the Court of Appeals answered the above contention (265 N. Y. p. 181; R. 413-414) as follows:

> "That these easements would be worth $3,600,000 to the abutting owners if they now owned them is beside the point. What is the City taking from the railroads? That is the question. The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street. It, therefore, acquired no real title to these easements apart from the operation of its road. They otherwise still attach to the property of the abutting owners."

We submit that the Court erred in this conclusion. Of course the railroad could not have released the easements and still have continued to operate. But the railroad could have realized the value of the easements by an agreement made prior to, and as a condition of, the release.

Judge Lehman in his dissenting opinion said (265 N. Y. p. 187; R. 418):

> "It is clear, I think, that if the railway company were not compelled to abandon the structure, the abutting owners would be willing to pay the railway company a very substantial amount for its abandonment with its consequent accretion of great additional value to their land and buildings. That amount would constitute the realizable value of the railroad property to its owner, even if its user for railroad purposes were unprofitable and a burden upon the owner."

This conception of the availability of these easements for sale to the abutting owners was by no means speculative, as the New York courts appear to have supposed; nor does

it infringe the rule that the value to be ascertained does not include "any element resulting subsequently to or because of the taking." (See *Olson* v. *United States*, 292 U. S. p. 256.) On the contrary this availability existed prior to the condemnation and was taken away by the condemnation.

The property owners, no matter how strong their desire was to be rid of the spur, could not have compelled its abandonment. They had no power to condemn. Manhattan, on the other hand, had a perpetual franchise of which it could not be deprived except by condemnation and the payment of fair value for its property.

Section 237 of the New York Railroad Law, which had been in force for years before this condemnation, gave to the railroad the right, by the required corporate action, to make a declaration of abandonment of any portion of its right subject to the approval thereof by the Public Service Commission. This obviously made possible a negotiation with the abutting property owners. It would have been entirely competent for the railroad company to go to the property owners and offer in effect to sell these private easements back to them. The precise procedure would have been that, upon a binding offer by the property owners of the sum of money which, after negotiation, should have been agreed to be the value of these easements, the railroad would file a declaration of abandonment and apply to the Public Service Commission for approval thereof. The views of the public authorities as to the desirability of restoring 42nd Street to unimpeded street uses, as evidenced by the determination of the Public Service Commission herein that the spur was an obstruction to the street, make it reasonably certain that such approval would have been forthcoming. The relatively small num-

ber of abutting owners, and their active desire to secure the removal of the spur, satisfies every requirement of practicability of such a disposition. But the abutters, through the so-called 42nd Street Property Owners' and Merchants' Association, pursued another method and by agitation for the removal of the spur, which they began as early as 1912 (R. Ex. AX, Vol. II, 825-827, 831) turned the legislative power of eminent domain for legitimate public purposes (the removal of obstructions to traffic) to serve their private interests in the acquisition by them of the private easements.

This proceeding in fact was one whereby, at the instance of the abutting property owners, the structure was removed and the easements were restored to them, a part of the cost being imposed upon them.

This situation is clearly recognized in the decision of the Appellate Division, wherein it was said (229 A. D. 617, p. 624; R. 295):

> "If the courts should now determine that these rights should be taken from the railroad and added to the respective properties of the abutting owners without compensation, the courts would be unjustly enriching the property owner at the expense of the railroad. While it is true that this proceeding is one between the city and the railroad, yet as a part of this same statute it is provided that the cost of acquisition of the property taken shall be assessed upon the property benefited."

The Appellate Division further said (229 App. Div. p. 627; R. 299):

> "Looking, therefore, at the result accomplished by the special statute pursuant to which this condemnation is had and the net result accomplished

thereby, namely, that these rights acquired from the property owners are returned to them and extinguished (*Matter of Mayor, etc., of N. Y.*, 186 N. Y. 237, 244), we reach the conclusion that the railroad is entitled to compensation therefor. A contrary result would be unfair to the railroad because it would turn over these rights of property acquired by the railroad on a basis of judicial determination and restore them to the property owners at the expense of the railroad and without payment therefor by the abutting owners."

The plan of the statutes and the action taken thereunder were such as to constitute the abutting owners, or the city as an intermediary, the willing purchaser assumed in determining fair market value.

A negotiated sale was feasible also under the statutes involved herein. The first of these statutes (Laws 1917, c. 788) authorized the Public Service Commission, with the approval of the Board of Estimate and Apportionment, to permit the removal by Manhattan of the spur upon the terms therein described if such terms should be "accepted" by Manhattan. No such acceptance having been given, Chapter 611 of the Laws of 1919 was enacted providing for condemnation.

It appears from the record that before the institution of the condemnation proceedings, the Board of Estimate and Apportionment authorized the President of the Borough of Manhattan to negotiate with the Railway Company for removal (R. Ex. AX, Vol. II, 1087) and that the President of the Borough of Manhattan subsequently reported in detail as to his efforts to reach an agreement with the Railway Company. The value of these easements had a very important part in these negotiations (R. Ex. AX, Vol. II, 1088-1094). The conclusion of the Borough

President was that no agreement could be reached (R. Ex. AX, Vol. II, 1093).

The City then proceeded to condemnation under the Act of 1919 and the amending act of 1923. At any time before the vesting of title as provided by the latter statute it was possible that an agreement might be reached. It is clear that the consummation of the condemnation took away from Manhattan this method of disposing of its property.

There can be no question that the plan of condemnation set forth in the enabling statutes recognized that Manhattan owned the easements and that they were to be taken and paid for. The Act of 1919 provided:

> "Whenever the said board of estimate and apportionment determine it to be necessary or advisable to remove from the street such tracks, structure, station and appurtenances or such unit or portion thereof as shall have been determined by said commission, *the said city shall also condemn* the rights, easements and franchises of the said Manhattan Railway Company to construct, maintain, operate or use said tracks, structure, station and appurtenances or any unit or portion thereof." (Italics ours.)

By the Act of 1923, the statute was further amended not only to carry out the same general plan, but to contain more detailed provisions as to the method of condemnation and also to provide that if the Board of Estimate and Apportionment should deem it in the public interest that "title to said rights, easements, franchises and property should be acquired by the city of New York prior to the entry of the final decree" the said Board might by vote "direct that title

to said rights, easements, franchises and property shall be and become vested in said city upon a specified date and upon the date so specified, said city *shall be and become seized* of said rights, *easements,* franchises and property". (Italics ours.)

Pursuant to the plan thus set up, title vested in the City on December 7, 1923, by the requisite vote of the Board (R. Ex. AX, Vol. 1, 89-94)—the resolution providing that "title in fee to and the right to remove" the structure, etc. "and all rights, easements and franchises of every nature whatsoever * * * shall vest in the City of New York on the 7th day of December 1923".

The City acquired title, pursuant to the statute of 1923, by the resolution above mentioned, and transferred the cost of the acquisition to the property owners. The restoration of the property to the abutting owners constituted the essential justification for imposing the expense upon them. The statutes in question effected exactly the result which was intended, namely, that the properties, including the easements, should be taken, the easements and other benefits restored to the property owners, the cost imposed upon them, and the compensation fixed by the Court, if it could not be arrived at by agreement. This statutory plan was such as to provide for compensation based, as in the case of any other property, on the fair market value between willing seller and willing purchaser at the time of vesting of title. Apart from our argument, above stated, that the easements were prior to the condemnation available for disposition to the abutting property owners, the condemnation statutes themselves contemplated full compensation regardless of limitations, if any, arising from railroad use. *Matter of Ninth Avenue and Fifteenth Street,* 45 N. Y. 729, 732-5; *In re The City and South London Ry. Co. and the Rector,*

etc., [1903] 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords).

In the *Ninth Avenue and Fifteenth Street* case, the lands condemned were owned by the City in fee but were held by it only for the purposes of a public park (Prospect Park, Brooklyn), and could not be used for any other purpose without legislative authority. The act under which the condemnation took place provided for the assessment, upon the land benefited thereby, of the damages sustained by the owners of the land taken for the improvement (street widening). The award was made upon the theory that by the effect, although not by the specific provisions, of the act authorizing condemnation, the City was relieved from limitations upon the use and value of the property taken. The assessed property owners appealed on the ground that the owner of the land, because of the alleged limitation to park uses, was entitled only to nominal damages. The Court held that the statute authorizing the condemnation relieved the property of the use limitations and that the awards made upon that theory were correct.

See also *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234.

Whether it be considered that the City took the easements directly for the purpose of what might be termed a resale, or whether it be considered that the City took them in reality as intermediary for the abutting owners, it is certain that the City took this form of property possessed by the Railway Company, which had a clearly available use and a clearly and readily ascertainable market value; and that unless the Railway Company shall be paid for what was thus transferred to the property owners, the result—contrary to the clear intention of the Legislature—will be to do what the law has always prohibited; that is,

to "take the private property of one individual, without his consent, and give it to another." (*N. Y. & Oswego M. R. R. Co.* v. *Van Horn*, 57 N. Y. 473, 477; see also *Matter of Mayor, etc. of New York*, 186 N. Y. 237, 246.)

There is obvious injustice in making peculiar and novel rules of appraisal to fit each particular case; and especially to hand over full value to the abutting property owners but at the same time not to pay full value to the railroad. In fact, the abutting property owners have here obtained full title and the full present value of the easements for only 65% of the cost and expense of the proceeding.

There is nothing in the case of *Heard* v. *City of Brooklyn*, 60 N. Y. 242, relied on by respondents, which justifies denial to petitioners of full value for their property. In that case a railroad which had an easement of right of way purported to deed to the City certain portions thereof for street uses. The railway actually abandoned the railway use, taking up the rails. The court held that the abandonment of the use worked a reversion of the property to the abutting owner. Assuming that abandonment of the railroad in the present case would work a reversion, there was no abandonment. The railroad could not have been compelled to abandon. Such property has no "characteristic of evanescence", as asserted by respondents. A railroad's right of way

> "* * * cannot be appropriated in whole or in part except upon the payment of compensation.
>
> "In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power

> is * * * that the statute conferring it make provision for reasonable compensation to the owner of the property taken." *Western Union Tel. Co.* v. *Penn. R. R.*, 195 U. S. 540, 570.

It is too clear for argument that these principles enunciated by this Court would be set at naught if the exercise of the power to take away left, as respondents contend, nothing to be paid for. The easements were taken in perpetuity by the Railroad and paid for on that basis, and there was no diminution of such payment by reason of the possibility of a reverter. *Hudson & Manhattan R. R. Co.* v. *Wendell*, 193 N. Y. 166, 179; *Miner* v. *New York Central & H. R. R. R. Co.*, 123 N. Y. 242. As this Court said in the *Western Union* case, *supra*, of its decision in *New Mexico* v. *United States Trust Co.*, 172 U. S. 171 (p. 570):

> "We there said (p. 183) that if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property.'"

The *Heard* case has nothing to do with the price that must be paid upon the condemnation of such property.

The same fallacious argument of respondents permeates their contention that the determination of the Public Service Commission that the spur was no longer needed in the public service and was an obstruction to the public street *ipso facto* took Manhattan's property or caused it to revert to the abutting owners.

The City would have had no power to condemn the spur except for the enactment of the special enabling statutes above discussed. *Matter of City of New York (Saratoga*

Avenue), 226 N. Y. 128, 135. The determination of the Public Service Commission was made only for the purposes of the statute of 1919, that is, to clear the way for such condemnation.

In their brief in opposition to the petition for certiorari herein the City and property owners repeatedly referred to the determination of the Public Service Commission, and to the failure of Manhattan to appeal therefrom, as if the Commission had made some determination as to value which is *res adjudicata* herein, or at least that the Manhattan, by not seeking to review that determination, had acquiesced in a finding that the spur was of no value.

This contention is utterly without merit. There was no determination by the Public Service Commission of the value in condemnation. That statute authorized condemnation if the Commission should determine *either* that the spur was "no longer necessary and convenient to the public service" *or* that it constituted "an impediment or obstruction to the public use of the street". Since the determination was on both grounds, and the obstruction of the street was indisputable, an attempt on the part of Manhattan to review the Commission's determination would have been futile. Even the Commission's finding that "the spur is no longer necessary and convenient for the public service" was on its face a relative one and mingled with considerations relating to obstruction of the street. The finding was expressly predicated upon the proposition that "The opening up of that great artery of crosstown traffic in Forty-second Street, and sidewalks of the present obstruction, will be of infinitely greater public service than will the continuation of the spur" (12 P. S. C. Rep. 1st Dist. p. 65). The statute expressly provided for condem-

nation, following the Commission's determination, of the "structure", "easements" and "franchise" for which just compensation was to be paid.

The courts below properly rejected respondents' argument based on the *Heard* case and the determination of the Public Service Commission. They properly held that the abutting property owners should not be unjustly enriched by restoring these easements to them without compensation to the railroad. The result of their decision, however, was that property was taken from the railroad and turned over to the abutters which at the time of taking in 1923 was worth $3,600,000 and the railroad was compensated therefor only by what it was worth between 1888 and 1904. This took the railroad's property without due process of law.

As Judge Lehman said in his dissenting opinion (265 N. Y., p. 191; R. 421):

> "The amount fixed by the courts below as the present value of the property rights bears no relation to any value which might be obtained from user of the property, or as the price of its abandonment or transfer. It is purely arbitrary. It may be greater or less than the value. Property is taken without due process of law when the compensation paid is fixed arbitrarily rather than by a determination of the value which might be obtained from user and sale."

SECOND: DUE PROCESS OF LAW WAS DENIED BY THE JUDGMENT THAT ONLY JUNK VALUE SHOULD BE PAID FOR THE RAILWAY STRUCTURE, WHICH HAD BEEN FOUND TO BE SUITABLE AND WELL ADAPTED TO ITS PURPOSE, AND THAT NO COMPENSATION SHOULD BE MADE FOR THE RAILROAD'S FRANCHISE AND RIGHTS IN THE STREET.

The spur was built under a franchise *requiring* connection "with other steam railways or the depots thereof", which included the Grand Central Station. (Laws of 1875, c. 606, Sec. 36 (Rapid Transit Act); *Mayor* v. *Manhattan Railway Co.*, 143 N. Y. 1, 32, 33; R. Ex. AX, Vol. III, 1249, 1325-1326, 1374-1375, 1528.) It was found and not disputed that it was "suitable for and well adapted to the purpose of an elevated railway (126 Misc., p. 913; R. Ex. AX, Vol. IV, 1983).

The questions stated in the above point heading are discussed together because the holding of the New York courts awarding the owner a nominal junk value of $235 for the structure and nothing at all for the franchise, or the rights thereunder to occupy the street, were all predicated almost wholly upon the conclusion of Mr. Justice O'Malley at the first trial that "the claimants have failed to sustain the burden of establishing that the spur, at the time title vested, *when considered by itself*, was profitably operated." (126 Misc. p. 895; R. Ex. AX, Vol. IV, 1955.) (Italics ours.)

The nature of this finding was exaggerated by the Court of Appeals which said (265 N. Y. p. 178; R. 411) that the claimants' demands were large "considering that it was

their *desire* to escape the maintenance and operation of the 42nd Street spur" (italics ours). There is nothing in the record to justify this statement.

In fact, Mr. Justice O'Malley found that the Manhattan consistently opposed the removal of the spur (126 Misc. pp. 883, 885, 899, 914; R. Ex. AX, Vol. IV, 1936, 1939, 1961, 1985); and this was also stated by the Appellate Division (229 App. Div. p. 620; R. 288). The attitude of Manhattan was one of "complete opposition to the removal" (R. Ex. AX, Vol. II, 1089). Even after condemnation had been authorized by the Board of Estimate and Apportionment, the validity of the proceedings was questioned by Manhattan and Interborough at Special Term on the City's application for the order of condemnation (R. Ex. AX, Vol. II, 1110) and on an appeal taken by them from the order of condemnation (208 App. Div. 794).

Mr. Justice O'Malley's finding, above quoted, does not, we submit, support the interpretation placed upon it by the appellate courts. After that statement, Mr. Justice O'Malley proceeded (126 Misc. p. 896; R. Ex. AX, Vol. IV, 1956):

> "But the fact that the spur probably was operated without profit is not conclusive on value. It was an integral part of an elevated railroad system which is shown upon the evidence to be operated on a paying basis. This system is composed of various parts, many of which, if considered separately, might show unprofitable operation. Upon the basis of earning power adopted by the city no doubt it would be possible to show that various portions of the claimants' system, such as specified stations or particular portions of trackage between stations, are operated at a loss. Clearly this should not be

adopted as an absolute or final test. Steam railroads, no doubt, have many spurs and switches which may be maintained and operated at a loss to the companies, yet their maintenance and operation may promote the maintenance and operation of the complete railroad system and thus lend some value to their franchises."

Mr. Justice O'Malley also referred to the possibility that the Manhattan's lease to the Interborough might be terminated (both companies have since gone into receivership), in which event the spur might be of great value to the Manhattan's Third Avenue Line in competition with the Interborough's Lexington Avenue Line, especially as the Manhattan in separate operation would not be limited to a five-cent fare; and held (citing *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 125, 126) that such facts should be taken into consideration with the other circumstances (126 Misc. p. 897; R. Ex. AX, Vol. IV, 1957-1958).

Mr. Justice O'Malley, therefore, citing and following *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84, held that the structure should be given substantial value, based largely on reproduction cost less depreciation; that claimant's experts calculated this amount to be $185,413, and the City's experts $120,438; that the difference resulted largely from the greater depreciation claimed by the City's experts; and that the value given by the City's experts should be adopted (126 Misc. pp. 912-913; R. Ex. AX, Vol. IV, 1983-1984). He held that the franchise had some value and awarded for it, and the perpetual right to occupy 42nd Street, $25,000 (126 Misc. p. 911; R. Ex. AX, Vol. IV, 1980).

The Court of Appeals, while recognizing that the spur was part of a system "operated at a profit", held that "the [Appellate Division's] finding that the Forty-second street franchise had no value should not be disturbed". As to the structures, it held that "The right to have the structure in the street was worthless if the street franchise was terminated. The structures had only a nuisance value when the right to have them in the street ended" (265 N. Y. p. 182; R. 414). But the franchise was terminated only by this very condemnation. It is a strange doctrine that a structure which at the time of condemnation was properly in the street will be given only a nuisance value because by the consummation of the proceeding it became unlawful longer to maintain it.

There has in fact never been any finding that the spur was an unprofitable venture, except in the limited sense above quoted. It has been found that the spur produced an operating loss; but equally it has been found that the spur was a part of a system operated at a profit. Even considered by itself, the spur was no inconsiderable property. When taken, it daily accommodated an average of between 12,000 and 13,000 passengers on the basis of counts taken by the City and the claimants (R. Ex. AX, Vol. I, 572, 573, Vol. II, 580, 787). Its use was then increasing (126 Misc. p. 891, R. Ex. AX, Vol. I, 539-541) and was then greater than in many earlier years. Its traffic had been subject to fluctuation due to the effects of subway competition. Prior to 1904 the passenger traffic had been rising. In that year it fell off sharply because of the opening of the first subway. But after 1912 traffic rose until 1918, when the Lexington Avenue subway north of Grand Central was put in operation. The spur traffic then declined again, but again turned upward before the present condemnation

(126 Misc. pp. 890-892; R. Ex. AX, Vol. IV, 1947-1950; Vol. I, 324-325, 544-545; Ex. K-7 in Ex. AX, Vol. IV, 1922). Mr. Justice O'Malley found that by 1923 the subway stations at Grand Central and Times Square had practically reached the point of saturation (126 Misc. 892, R. Ex. AX, Vol. IV, 1950, 1951).

The dangerous congestion of 42nd Street required a determination by the Public Service Commission that public convenience and necessity would be served by the removal of the spur; but property devoted to public convenience under a franchise requirement and adequately serving its required function cannot be confiscated by an award of no value, or "junk value".

The protection against confiscation by eminent domain of the whole category of properties not profitable in and of themselves, but provided under franchise requirements by railway and other public service corporations in response to public demand, is involved in the determination of the New York courts in this case that the structure, franchise and public easements may be taken in this proceeding without substantial compensation.

Facilities which promote public convenience, like transfer and terminal facilities, as well as those which promote public safety, like signal equipment and non-grade crossings, which only to a limited degree contribute to profit, are in increasing measure being provided under legislative and commission requirements. Capital costs which have regard to public welfare as distinct from profit have become more and more generally obligatory. To take such property without compensation would penalize its provision as compared with that of facilities which subserve purely private profit.

1. The Structure.

Where, as in the present case, the structure is found to be suitable and well adapted for its purpose, and used as part of a plant, so-called structural value, or the cost of reproduction less depreciation, is an important element which must be taken into consideration in ascertaining its value in condemnation. *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84; *New York Telephone Co.* v. *State*, 169 App. Div. 310, 323, aff'd 218 N. Y. 738. In the case of *United States* v. *Boston, Cape Cod & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1st), relied on below by respondents, the decision turned on the fact that at the time of condemnation construction prices were abnormal, due to the War (p. 889). Where the property is a profitable concern, it may be given a going value *in addition*. *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202-203; *National Water Works Co.* v. *Kansas City*, 62 Fed. 853, 865, (C. C. A. 8th Circuit; Brewer, Sanborn & Thayer, *J.J.*). It has been held that the elevated structures erected under the Manhattan franchise cannot be taken without just compensation. *Manhattan Railway Co.* v. *Mayor*, 89 Hun. 429, 431.

Mr. Justice O'Malley's decision that claimants "are entitled to substantial damages on account of the taking of their physical structure, and that this value must be based largely upon the structural value" (126 Misc. p. 913; R. Ex. AX, Vol. IV, 1984) should not have been disturbed. He held that "structural value is not conclusive, but is some evidence of value". The figure which he adopted was based on the City's evidence and was the lowest estimate of substantial damage in the record, although the City contended then, as now, that only junk value should be given.

We have seen no decision which holds that, where property taken is part of a profitable system, constitutional

protection against confiscation is to be denied because the particular part taken produces an operating loss. Such a principle would be disastrous if applied, for example, to bridges on an unprofitable part of a profitable railroad system. As an example to the contrary, see *Matter of Mayor*, 39 App. Div. 589, wherein a reserve gas plant, which had not been in use for several years but had been kept up, was valued in condemnation as a going plant, although obviously its ownership must have produced, taken by itself, operating loss rather than profit.

The structure when taken was real estate. *People ex rel. New York Elevated R. Co.* v. *Commissioners*, 82 N. Y. 459, 462; *Manhattan Ry. Co.* v. *Mayor*, 89 Hun. 429, 431. It was error to value it as detached junked personalty. *Denver* v. *Denver Union Water Works Co.*, 246 U. S. 178, 191. The City takes, and must pay for, annexed property "as it then exists",—that is, as realty. *Matter of City of New York* (*Allen Street*), 256 N. Y. 236, 241. In *Jackson* v. *State*, 213 N. Y. 34, the court reversed an award for fixtures because they had been valued not as real estate but as "second-hand articles" severed from the warehouse. The court, per Cardozo, *J.*, said that such a valuation was "intolerable". In effect, the valuation herein was not as of the time of taking but as of a subsequent date,—that is, after removal,—contrary to the established rule which is inherent in due process (*Olson* v. *United States*, 292 U. S. 246, 255).

2. The Franchise.

The franchise consisted of grants from the State and City and had its source in the Rapid Transit Act (Laws 1875, c. 606). It has been held that this must be construed as a "grant made by the State upon consideration". *Mayor*,

etc., of New York v. *Manhattan Railway Co.*, 143 N. Y. 1, 31, 32. The acceptance of the franchise and the building of the spur structure under its requirement constituted a contract between the State and the railroad which was property protected by the constitution. *Los Angeles* v. *Los Angeles Gas & Electric Corp.*, 251 U. S. 32; *New York Telephone Co.* v. *State*, 169 App. Div. 310, aff'd 218 N. Y. 738. In *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544, 555, 556, this Court held that an attempt to terminate a part of a franchise by reason of traffic congestion was a violation of the contract clause of the federal constitution.

A franchise "can no more be taken without compensation than can * * * tangible corporeal property". *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329. We repeat that just compensation may not be measured by regarding only the income produced by the spur considered by itself. It was an integral part of the profitably operated Third Avenue Line. The elements of value, actual and potential, which Mr. Justice O'Malley found that it possessed required that some substantial value be awarded for its taking.

3. The Public Easements.

While the Manhattan's right to occupy space in the public street was vested in it under the franchise, it was distinct from the franchise to operate the railway.

The City's grant under the franchise purported to convey all the interest in the street requisite to permit the railroad to build its structure and operate its trains. As above pointed out, only the conclusion of the Court of Appeals, that the private easements of light, air and access were owned by the abutters and not controlled by the City,

prevented them from passing also. *Herzog* v. *New York Elevated R. Co.*, 14 N. Y. Supp. 296, 297, 298, affirmed in 76 Hun, 486, the opinion below being specifically approved, and affirmed on opinion below, 151 N. Y. 665. The railroad under the City's grant therefore acquired, as against the City, the right to occupy with its columns, station approaches and so forth, valuable street space. It "obtained an interest in and to a certain extent a title to the street for the purpose of construction and operation of its railroad, which was in the nature of property". *White* v. *Manhattan Railway Co.*, 139 N. Y. 19, 26. Since the City's grant was duly made with legislative authority, "it amounted also to an immediate grant of an interest, and, it would seem, of a freehold interest in the soil of the streets". See *Milhau* v. *Sharp*, 27 N. Y. 611, 620. Such a right has been held to be a "perpetual and indefeasible interest in the land constituting the streets". *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513. It has also been held that neither the police power nor any implied reservation by which a railway is sometimes required to make alterations for the public benefit would justify a requirement that such structures should be removed, or even changed, without compensation. *Manhattan Railway Co.* v. *The Mayor*, 89 Hun, 429.

Whether these public easements were of so distinct a nature that they should have been separately valued, or were, as the lower courts have held, so inseparable from the franchise that it and they must be considered as a single entity, they could not, we submit, be taken wholly without compensation. The City has established a schedule of charges which it levies upon persons who procure from it licenses to construct and maintain overhead structures, passageways and the like in the space over streets (Ex. W, R. Ex. AX, Vol. III, 1760). Claimants' expert, on the ba-

sis of this and other methods of appraising similar interests in public streets, testified that the value of these public easements was $300,000 as a minimum value (R. Ex. AX, Vol. II, 1026-1028). This was the only evidence of value in the record, the City limiting its position to the contention of law that no value should be awarded.

4. The Depew Place Easement.

It was the opinion of the Appellate Division, that the public easements and the franchise were inseparable and that the franchise was without value, which chiefly influenced Mr. Justice Mullan's holding on the re-trial that no compensation whatever should be awarded for the so-called Depew Place easement.

At the time of the condemnation this was no different in character or in its elements of value from the other private easements taken. It was an easement with respect to property which was then and had since 1905 been in the private ownership of the New York Central Railroad Company. But even the limited measure of compensation which was made for the other private easements was denied as to it, solely because of the time and manner of its acquisition. While the abutting property in question had been in private ownership at the time of the construction of the spur in 1878, the railroad did not acquire the easements with respect to it before the abutting property was purchased by the City in 1885. Mr. Justice Mullan held (141 Misc. pp. 568-569; R. 333-334) that at that instant the City's grant to the railroad pursuant to the franchise took effect (*Herzog* v. *Manhattan Railway Co.*, 14 N. Y. Supp. 296, 76 Hun, 486, 151 N. Y. 665, *supra*; see also *Mayor of the City of New York* v. *Manhattan Railway Co.*, 143 N. Y. 1, 30; *Hindley* v. *Manhattan Railway Co.*, 185 N. Y. 335, 355).

Mr. Justice Mullan's conclusion was that, since the easement with respect to Depew Place was acquired from the City rather than from a private abutting owner, it was in no different class from the public easements to encumber East 42nd Street; and that, as the Appellate Division had ruled that the franchise and right to occupy the street were no value, it followed that these rights had no value. He confessed (141 Misc. p. 570; R. 336) that this ruling "seems to create an anomaly", but said "that the anomaly is inherent in the nature of the right against the City". We suggest that the anomaly was created only by the incorrect rulings of the Appellate Division, first, that conditions at the time of acquisition of the easement by the railroad, rather than at the time of taking, should control, and, second, that because the franchise was held to be without value all interests in real property which were granted pursuant to it were likewise without value.

If the New York courts were to be upheld in their decision denying any compensation whatever for the Depew Place easement and the public easements, it would have to be upon the ground that those properties themselves were worthless, and not upon the ground that the franchise to operate the spur was worthless.

The Depew Place easement is included in the calculation of $3,600,000, which with interest is asserted by the claimants to be the proper measure of compensation for all private easements. If, however, the judgments below should be allowed to stand with respect to the private easements in general, there should be added to the award therefor the value of the Depew Place easement according to the rule of valuation applied by the New York Courts in the amount of $29,157.48 (141 Misc. p. 569; R. 335).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE MODIFIED IN ACCORDANCE WITH THE PRINCIPLES URGED HEREIN.

Dated, March, 1935.

Respectfully submitted,

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